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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted]216

FRED T. MACKEY, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FRED T. MACKEY, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on April 1, 1965.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A16) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A17) was entered on April 1, 1965. A timely petition for rehearing and for rehearing en banc was denied on May 13, 1965 (Appendix B(2), *infra*, pp. A17-A18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case of alleged tax evasion sought to be proved by the net worth method, where the prosecution contends that the defendant's unreported alleged excess income derived from his admitted operation of a policy wheel, and then argues that "Gambling is an occupation with indeterminate possibilities," it may properly allow him no credit for any currency on hand whatever at the beginning of the prosecution years on the strength of his pre-prosecution-year returns and of his refusal to make any statement to revenue agents in advance of trial concerning his cash on hand, in a situation where the defendant's mode of life does not suggest poverty or penury in any respect, and where the evidence shows that he transacted much business with currency throughout the entire prosecution period.

2. Whether, where the basic issue in a case of alleged tax evasion sought to be proved by the net worth method turns on whether the defendant's unreported alleged excess income of $4000 per week came from the policy wheel operation that he admited conducting, or from unrecorded premium income earned by insurance companies that he controlled (which in those years did not need to be reported), and 830 pounds of insurance company records are produced in court pursuant to a prosecution demand, and a prosecution witness then testifies to the presence of 300 additional pounds of similar records in another office, the prosecution has complied with its duty of tracking down relevant leads when, after two weeks' opportunity to study the first group of records and a similar period of time to obtain the others,

it never offers any of the 1100 pounds of records or even any summary of them into evidence.

STATUTE INVOLVED

The statute under which petitioner was prosecuted, though nothing turns on its terms, was § 7201, I.R.C. 1954, which provides as follows:

> "§ 7201. Attempt to evade or defeat tax
>
> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT

The facts necessary to place in their setting the questions now raised can be briefly stated.

A. The basic facts.

Petitioner was indicted in five counts for violation of § 7201, I.R.C. 1954 (*supra*), that alleged willful attempts to evade and defeat income taxes for the years 1956 through 1960 by filing knowingly incorrect returns (R. 13-20).[1] Following a trial lasting seven weeks (R. 3-7), and jury deliberations that covered parts of five days (R. 1970-1978), he was convicted on all counts (R. 1978), and sentenced to five years' imprisonment and a fine of $10,000 and costs on each count, the sentences to imprisonment to run concurrently

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[1] The first (March 1963) indictment (R. 13-17) was superseded as to its last four counts by a second indictment filed in October 1963 (R. 17-20).

"R." refers to the petitioner's appendix below, which contains the bulk of the record, "P.R." to the prosecution's appendix, which extends to only 49 pages.

(R. 66-70). He paid the fines and costs, aggregating over $65,000 (R. 78), after which, on appeal (R. 72-73), the convictions were affirmed (Appendices A and B(1), *infra*, pp. A1-A17). On rehearing one sentence of the opinion was deleted (*infra*, p. A15), but in all other respects rehearing was denied, by the division that heard the case as well as by the full court (Appendix B(2), *infra*, pp. A17-A18).

The prosecution used the net worth method to prove its case, asserting that the net worth of the petitioner and his wife at the starting point, December 31, 1955, was $361,461.52, and at December 31, 1960, was $1,519,744.05, an alleged increase of over $1,250,000 in a five year period during which petitioner and his wife reported $143,339.24 of taxable income (Govt. Exs. 9-13,800-802; R. 2103-2153).

For purposes of this petition, we adopt the formulation of the principal issue at the trial set forth in the opinion below (*infra*, pp. A2-A3; footnote omitted):

> "Government used the net worth method to prove its case. Government's theory at the trial was as follows. The net worth of defendant and his wife at the starting point, December 31, 1955, was $361,461.52 and their net worth at the end of 1960 was $1,519,744.05. These amounts included assets held in the names of the Gibraltar insurance companies (discussed *infra*) and other nominees for the benefit of defendant. During this five-year period defendant and his wife reported $143,339.24 of taxable income.
>
> "Government contended that the Gibraltar Industrial Life Insurance Company (Gibraltar Industrial), Gibraltar Mutual Life Insurance Company (Gibraltar Mutual) and the M.W.E. & S. Investment Company, Inc., were entirely under defendant's dominion and control. It is asserted these companies had three safes into which flowed an average of about $4000 per week in currency during the five prosecution years, in excess of the sums which could be accounted for by the combined gross receipts of the companies, plus the income reported by defendant and his wife, and that defendant helped himself to this excess at will.

"Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week, *supra,* was from profits earned by defendant on this operation."

B. Did the prosecution's opening net worth statement properly deny petitioner any credit for currency on hand at the beginning of the period?

There is no dispute between the parties over the fact that the prosecution credited petitioner with no currency on hand whatever at the opening of the prosecution years (Govt. Ex. 800, R. 2104).

Special agent Brunk had an informal interview with petitioner in April 1960 (R. 1339-1340), in the course of which petitioner stated he was a policy operator, but, on the advice of his counsel, who was present, did not answer the agent's questions regarding his net worth, his assets and liabilities, or his cash on hand.

Revenue agent Kallimani traced the income tax return filing history of petitioner and his wife from 1929 to the commencement of the prosecution period (R. 1344-1348; Govt. Ex. 96, 97, 759, 760; P.R. 27-28). Kallimani testified (R. 1360) that "Based on my computation, he could not have had anything at the beginning of 1956." Harrington, however, the prosecution's principal expert, computed petitioner's net worth on this same date as $361,461.52 (Govt. Ex. 800, R. 2103-2151).

Revenue agent Harrington, who prepared (R. 1420) the net worth statement (Govt. Ex. 800, R. 2103-2151) used in the present case, explained his failure to give petitioner any credit for cash or currency on hand on the opening day in these terms (R. 1427):

"The cash on hand, as far as any direct evidence, there is no evidence of the amounts of cash on hand for December 31, 1955-1956, all the way through the net worth period. Any figure that I would put there

would be purely arbitrary on my part. It is possible that Mr. Mackay may have had $10,000, or any amount as of any one of these dates. I would say, as far as the record goes at this present time, the facts and circumstances with respect to each of these dates is the same. For that reason, I did not place any amounts there."

He testified further concerning the same item (R. 1661):

"I don't know how much cash he had on hand. There is no statement to the effect of X number of dollars. My explanation was that there was no evidence as to the amount of cash on hand, and if I were to select any figure, I believe even zero, as you point out might be considered arbitrary.

"Not knowing the increases or decreases of cash on hand, this is a factor that could influence the increase or decrease in net worth."

Harrington admitted that the Internal Revenue Service had made no effort to determine petitioner's currency on hand, except for the conference at which the latter on the advice of counsel refused to discuss that subject (R. 1661-1662); admitted hearing evidence at the trial of many of petitioner's transactions that were all handled with currency (R. 1662); admitted that petitioner must have had currency on hand over the years (R. 1662); and then testified (R. 1662-1663):

"Q. And notwithstanding that fact, you have determined that the cash on hand at the end of each year, December 31, was nothing; is that correct?

"A. I don't think I actually made a determination to any amount.

"Q. That is true.

"A. I said there would be factors there that would have to be considered in order to determine how much cash on hand there were, and there is no evidence in the record as to any exact amount of cash on hand,

but the fact that there was currency transactions would indicate that there would be cash on hand over the periods."

In the court below the prosecution argued (Pros. Br., C.A. 7, p. 5), citing Govt. Exs. 9-13, 765, and R. 1340, that

> "It was the Government's theory that the source of appellant's excessive net worth increases during the prosecution years was the policy wheel (numbers banker) operation which he was admittedly conducting during those years."

On the question whether the prosecution had sufficiently established an accurate starting point in its net worth computation, the court below said (*infra*, p. A12):

> "Whether defendant had substantial sums of cash at the starting point is a matter within defendant's knowledge. Under the circumstances such as those in this case, where Government conducted a thorough investigation and failed to uncover evidence of cash on hand, the burden is on defendant to come forward with evidence of cash and he remains quiet at his peril. See *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954), and *United States* v. *Holovachka*, 7 Cir., 314 F. 2d 345, 354 (1963)."

Further in the course of its opinion, the court below said (*infra*, pp. A13-A14):

> "Defendant stated '[t]here was no direct evidence of * * * a likely source of current taxable income for each of the years 1956 through 1960.' Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was evidence is not required. '[P]roof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.' *Id.* at 138. The following language in *United States* v. *Costello*, 2 Cir., 221 F. 2d 668, 671-672 (1955), affirmed, 350 U.S. 359 is applicable: 'There was no difficulty in the case at

bar in pointing to such a [likely] source. By his own admission * * * [defendant] was a gambler * * *. * * * Gambling is an occupation with indeterminate possibilities * * *.'"

C. Did the prosecution properly track down the relevant lead supplied by the more than 1100 pounds of Gibraltar Industrial Life Insurance Co. records?

Mrs. Benford, petitioner's sister (R. 497) and treasurer of the Gibraltar Industrial Life Insurance Co. of Gary, Indiana (R. 497, 772-773), testified that its books and records were complete with respect to its income (R. 775-777, 978-979). Those books were the basis for the annual reports submitted by the company to the Indiana State Department of Insurance (Govt. Exs. 125-129) and for its Federal income tax returns (R. 305-307, 777-779, 792-793, 1250-1251). The company's Federal income tax returns that were admitted in evidence (Govt. Exs. 22, 23) were prepared from the Indiana insurance reports (R. 305-307).

Mrs. Benford further testified, on direct examination, that the company received premium income which was not recorded on its books (R. 783-784, 787-788, 808-810), and which on cross-examination she estimated to range from $2500 and $3300 a week in 1949 to $7000 or $8000 a week in 1959 and 1960 (R. 1227-1229). The prosecution thereupon called for the production of all of the company's records dealing with insurance policy applications (R. 1264-1265), and those records, in 16 boxes weighing 830 pounds in the aggregate, were produced on the next court day, January 2, 1964 (R. 1289-1291). In addition, a prosecution witness immediately thereafter testified that there were 300 additional pounds of applications in the company's Indianapolis office (R. 1313), but those other applications were never requested by the prosecution.

It was the company's position, based on the advice of its then counsel, that premium income during the years in question was not taxable and hence did not need to be

reported (R. 1225, 1226-1227), and at the trial the prosecution's principal expert, Harrington, agreed that this was correct (R. 1672, 1677).

Mrs. Benford's testimony regarding the amount of weekly premium income was corroborated by her son, Jenkins, the company's Executive Secretary (R. 1291-1292, 1293), who placed the weekly receipts during the years 1958 to 1960 at $7000 or $8000 (R. 1314), and by Brewer, one of the company's field supervisors (R. 1325), who estimated the premium receipts from the agents under his supervision at $4000 or $5000 weekly in the later years (R. 1326, 1336), and at $2000 to $3000 weekly in the earlier years (R. 1336).

The prosecution rested its case on January 15, 1964 (R. 1795). Most of the following day was taken up with motions (R. 1796-1855), at the close of which petitioner also rested (R. 1855). On January 17, the 830 pounds of records, which had then been available to the prosecution in the Clerk's office for over two weeks, were ordered released to the company (R. 7, entry for 1-17-64).

The only reason ever assigned by the prosecution for its failure to introduce the applications in evidence (Pros. Br., C.A. 7, pp. 26-27) was Jenkins' testimony (R. 1314) that "I imagine it will take two or three months to put them back together."

The court below disposed of this issue by saying (*infra*, p. A13):

> "Government is required to investigate and negate 'reasonable explanations *by the taxpayer* inconsistent with guilt' in order to establish its proof in a net worth theory case. *Holland* v. *United States*, 348 U.S. 121, 135 (1954). (Emphasis added.) However, defendant in this case did not furnish any explanation which would attribute his increased net worth to other than taxable income. Defendant had the right to remain silent but he did so 'at his peril.' *Id.* at 139."

REASONS FOR GRANTING THE WRIT

Ten Terms ago, when the net worth method of proving understatement of taxes was first examined here in detail, this Court concluded that "it is so fraught with danger for the innocent that the courts must closely scrutinize its use" (*Holland* v. *United States*, 348 U.S. 121, 125). But the admonitions and the cautions that were there painstakingly formulated with precision and specificity have been either verbalized away or else completely disregarded in the present case, and an arbitrary assumption regarding the essential element of opening currency on hand that no less than four circuits have rejected in civil deficiency cases, which start with the presumption that the Commissioner is right and the taxpayer wrong, has here been permitted to supply vital proof in a criminal case, where the presumption is that the taxpayer is innocent and therefore right. The result, therefore, is that the present criminal trial has with the approval and approbation of the court below been turned, in substance and effect, into a show-cause proceeding, where the accused person must himself come forward at his peril to supply items of evidence essential to the prosecution's case, and, ultimately, to establish innocence.

The abuses of the net worth method reflected in the present record, in palpable disregard of this Court's considered warning that the "pitfalls inherent in the method • • • require the exercise of great care and restraint" (*Holland* v. *United States, supra,* at 129), strongly suggest that now, almost eleven years later, it is once more appropriate and indeed necessary for this Court to scrutinize what appears to have become the Government's routine prosecution technique in criminal tax cases.

First. "We agree with petitioners," this Court said in *Holland* at 132, "that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which

to calculate future increases in the taxpayer's assets." *Accord, Smith* v. *United States,* 348 U.S. 147, 155.

This "essential condition" is notably absent here. Passing the point that the prosecution's investigation of cash and currency on hand had on the testimony of its principal expert been of a most sketchy nature (*supra,* p. 6), it is plain from this record that the prosecution failed in its "duty * * * of approaching the problem fairly and open-mindedly, as a question of getting at business or economic reality, regardless of the fact that the taxpayer may be a revenue delinquent * * *." *Gunn* v. *Commissioner,* 247 F. 2d 359, 362 (C.A. 8).

Instead, the approach of the prosecution and of both courts below was that of heads-we-win-tails-you-lose. The petitioner was shown to be engaged in gambling, "an occupation with indeterminate possibilities" (*United States* v. *Costello,* 221 F. 2d 668, 672 (C.A. 2), affirmed on other grounds, 350 U.S. 359), but he was not credited with a single penny in currency at the beginning of the net worth period. Similarly, although the prosecution made much in its closing arguments of the many transactions petitioner handled with large sums in currency (R. 1868, 1869, 1874, 1875, 1916, 1917, 1922, 1927), it prosecuted him on the categorical assumption that he had no currency on hand at the beginning, an admittedly arbitrary figure cloaking the fact that no real effort had ever been made to ascertain the real sum (*supra,* pp. 6-7).

Here all the evidence pointed to the fact that petitioner's cash on hand was certainly substantial at the starting point. Gambling, quite as much as the purchase of produce from farmers (*Gunn* v. *Commissioner,* 247 F. 2d 359, *supra*), requires currency on hand; and here there was no countervailing evidence: Petitioner had not lived a life of penury or privation, as in *Holland* v. *United States,* 348 U.S. at 133, and *Friedberg* v. *United States,* 348 U.S. 142, 144; there was no proof that he had originally been a person

of modest means, as in *Smith* v. *United States,* 348 U.S. 147, 149, 157-158; there was no proof that he had ever permitted obligations to go unpaid, as in *United States* v. *Costello, supra,* 221 F. 2d at 672-673; the proof plainly negatived any earlier submission on his part of a net worth statement, as in the same case, 221 F. 2d at 672; and in view of his proved occupation of gambling, a fact relevant to establish that he had previously been engaged in that business (*Johnson* v. *United States,* 318 U.S. 189, 195-196), there was obviously no inherent improbability in his having had large sums of currency on hand at the beginning. Indeed, to conclude the contrary involves "a mathematical artificiality", that is "unrealistic as a general or business fact." *Gunn* v. *Commissioner, supra,* 247 F. 2d at 364.

In the face of what the prosecution proved regarding petitioner's occupation, and the lack of any evidence whatever that he had ever been in straitened circumstances, the testimony regarding his earlier tax return history concluding with revenue agent Kallimani's triumphant assertion (R. 1360) that "he could not have had anything at the beginning of 1956," quite fails to establish that fact; such a history is equally consistent with his failure to make accurate returns earlier. After all, agent Harrington, the prosecution's expert, fixed petitioner's net worth at the beginning of 1956, not at zero, but at $361,461.52 (Govt. Ex. 200, R. 2103-2151). In any event, in a net worth case seeking to prove unreported income in years not barred by limitations, the prosecution can hardly rely on the defendant to supply evidence of currency on hand by testimonial admissions that he may have violated § 7201 in other and earlier years on which the statute has run.

All that the prosecution showed, accordingly, was that, since petitioner did not himself state how much currency he had on hand, since it did not know—Harrington, the expert, said categorically (R. 1661) that "I don't know how much cash he had on hand"—since it made no real

effort to know, and since it could not allege violations by him in earlier years, therefore petitioner should not be credited with any currency on hand whatever at the starting point, even though the prosecution's key expert recognized (R. 1662-1663) that "the fact that there were currency transactions would indicate that there would be cash on hand over the periods."[2]

This precise approach, this revenue agent technique of giving no credit whatever for currency on hand simply because no effort at ascertainment of currency on hand was ever made, this bald assumption that "X Equals Zero," has been consistently rejected by the courts in decisions rendered subsequent to the guideline ruling here in *Holland* v. *United States*, 348 U.S. 121.

It was rejected by the Second Circuit in *United States* v. *Costello*, 221 F. 2d 668, 673, a criminal case, in respect of the count on which conviction was reversed. It was rejected by the Court of Claims in *Meyers* v. *United States*, 133 C. Cls. 123, 128, 134 F. Supp. 520, 523, a refund case where the taxpayer must prove the precise amount of tax due in order to succeed: "The most important part of a net worth computation is the beginning net worth and the most important part of that is cash on hand." And it has been rejected by four circuits in civil deficiency cases, where, quite unlike the situation in a criminal case, the presumption in favor of the Commission's determination operates against the taxpayer. *Marcella* v. *Commissioner*, 222 F. 2d 878 (C.A. 8); *Thomas* v. *Commissioner*, 223 F. 2d 83 (C.A. 6); *Thomas* v. *Commissioner*, 232 F. 2d 520

[2] The summary of Harrington's testimony in the opinion (pp. A11-A12)—"Treasury agent Edward Harrington testified that investigation had not revealed any cash on hand at any time in the net worth period and that if he had included a figure for cash at the starting point such figure would have been purely arbitrary"—is, to speak very mildly indeed, hardly a fair summary of Harrington's testimony at R. 1427 and R. 1662-1663 quoted *supra*, at pp. 5-7.

(C.A. 1); *Phillips' Estate* v. *Commissioner*, 246 F. 2d 209 (C.A. 5); *Gunn* v. *Commissioner*, 247 F. 2d 359 (C.A. 8); *Grubb* v. *Commissioner*, 315 F. 2d 753 (C.A. 6). We note in the margin some formulations of the prevailing principle.[3]

A fortiori, then, the plainly arbitrary conclusion here that petitioner had no currency on hand at the beginning cannot stand in a criminal prosecution to supply what this Court and so many others have held to be an essential element of the proof, viz., a reliable opening net worth statement.

Here the court below said (*infra*, p. A12) that "where Government conducted a thorough investigation and failed to uncover evidence of cash on hand, the burden is on defendant to come forward with evidence of cash and he remains quiet at his peril." Passing the point that there was no evidence that the prosecution's investigation of currency on hand was indeed thorough, see Harrington's evidence quoted *supra* at pp. 5-7, the vice of the quotation is that it quite misstates the test laid down here. What this Court said in *Holland* was quite different (348 U.S. at 138-139):

> "*Once the Government has established its case*, the defendant remains quiet at his peril."

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[3] "The presumption which favors the determinations of the Commissioner is not to be regarded as meaning that any arbitrary figure assigned to the cash on hand account without support in the record must nonetheless be treated as conclusive in the absence of an affirmative showing by the taxpayer of the correct amount. * * * nor is it appropriate for the Tax Court to fix an arbitrary figure unsupported by evidence simply because the taxpayer has made no affirmative showing to the contrary." *Thomas* v. *Commissioner*, 232 F. 2d 520, 524, 525 (C.A. 1).

"Yet although the petitioners here had the burden of proving that the Commissioner's determinations were wrong, if they did so, it was not incumbent on them to prove that they owed no tax, or what was the tax that they did owe." *Thomas* v. *Commissioner*, 223 F. 2d 83, 88 (C.A. 6).

We have added the italics, because here the Government had in fact not established its case: It had failed utterly to prove the "essential condition in cases of this type," namely, the "establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets" (*Holland* at 132). For, as the Fifth Circuit said in the *Phillips' Estate* case, 246 F. 2d at 213, "* * * the inference of unreported income can be drawn only if, and the if is a big one, a starting, opening net worth statement is established with some reliability. * * * If the opening statement is not substantially reliable, the whole intricate house of cards falls."

Second. Among the specific guidelines emphasized in the *Holland* case was the prosecution's duty to "track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence" (348 U.S. at 135-136).

We accept the statement of the prosecution and the court below that the major contested issue at the trial was whether the source of petitioner's net worth increases of "$4000 per week was from the policy wheel operation or from unrecorded and unreported premium income earned by the Gibraltar companies" (*infra*, p. A3).[4]

Obviously those companies' policy applications constituted a relevant lead. Equally obviously, after 16 boxes of such applications weighing 830 pounds had been physically produced in court in response to the prosecution's demand, and after a prosecution witness had testified to the presence of 300 additional pounds of applications in another of the company's offices (R. 1313), the prosecu-

[4] While we accept the quoted statement, we deem it proper to emphasize the agreement of both parties at the trial that during the tax years in question premium income was not taxable and was not required to be reported (*supra*, pp. 8-9).

tion had "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence" (*Holland, loc. cit. supra*).

Therefore, again to quote from *Holland* v. *United States*, 348 U.S. at 136, "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true, and the Government's case insufficient to go to the jury." But the trial judge here, disregarding this Court's admonition, denied petitioner's motion for acquittal (R. 1854), which had incorporated by reference (¶¶ 5 and 6, R. 1844-1845) arguments specifically rested on the prosecution's failure to track down these precise records (R. 1801-1802). And the court below strangely overlooked the 830 pounds of applications that had been produced and the 300 pounds of additional applications shown to exist, and hence quite misstated the record, when it said (*infra*, p. A13) that "defendant in this case did not furnish any explanation which would attribute his increased net worth to other than taxable income." When the court below then added, in its very next sentence, that "Defendant had the right to remain silent but he did so 'at his peril,'" citing *Holland* at 139, it not only quoted out of context (because what was there said by this Court followed the words "Once the Government has established its case"), it plainly disregarded as well what this Court had said in the same opinion regarding the prosecution's duty to track down relevant leads.

To conclude that, if the prosecution had indeed examined the 830 pounds of applications that were available to it for two weeks (*supra*, p. 9), its failure to introduce them (or even a competent summary thereof) meant that they were unfavorable to its case, is certainly not a far-fetched inference. *Clifton* v. *United States*, 4 How. 242, 247. And we should add that, while the prosecution's failure to make known what it had received pursuant to a demand dramatically put forward in the course of the trial high-

lights its lapse, its duty was actually far broader: The prosecution was bound as a matter of law to investigate a lead so obvious as the Gibraltar companies' applications before it ever sought an indictment.

What is primarily significant here, however, is that the court below gave no effect whatever to what this Court had solemnly declared to be a necessary safeguard in net worth cases, namely, the prosecution's duty to track down relevant leads—here not the possible or fanciful pursuit of unproved or vaguely suggested negatives, but a mass—literally a mass—of over half a ton of tangible documentary evidence.

Third. The matters noted above go to the heart of the net worth method, and the rulings thereon made below all too plainly brush aside as unimportant the structure of safeguards insisted on by this Court in the *Holland* case. It may be that, as the Eighth Circuit noted in *Gunn, supra,* 247 F. 2d at 362, "the fancifulness and tenuousness of such claims [of cash hoards by taxpayers in some cases] have also probably tended to a light treatment of the question of cash assets in other situations, without regard to apparent economic realities and persuasive commercial implications, unless the taxpayer has been able, by records or otherwise, to make definitive and inescapable demonstration."

But while this may well be an explanation for the disregard below of the cautions insisted on by this Court, it is not an excuse. Nor can the lapses in the present case be brushed aside as harmless error. This prosecution was far from open-and-shut, as the jury's five days of deliberation (R. 1970-1978) plainly show. Indeed, to recur to what another division of the court below said only recently, of a trial of comparable length similarly followed by long deliberations (*United States* v. *Wortman,* 326 F. 2d 717, 729):

> "* * * with a trial that lasted six weeks, it is a matter of grave doubt as to whether the verdict

reached after four days of deliberation resulted from a proper appraisement of the record, confusion or exhaustion."

CONCLUSION

The judgment below eliminates the safeguards required by this Court in net worth cases, and rests affirmance of a criminal conviction on an assumption that four circuits have rejected in civil cases where the operative presumption operates against rather than for the taxpayer. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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